

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY E. FLORES

Claimant

VS.

IBP, INC.

Respondent

Self-Insured

Docket No. 237,376

ORDER

Respondent appealed Administrative Law Judge Brad E. Avery's Award dated July 16, 2001. The Board heard oral argument on January 23, 2002, by teleconference. The Director of the Division of Workers Compensation appointed Jeffrey K. Cooper of Topeka, Kansas, to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Claimant appeared by her attorney, Stanley R. Ausemus. The self-insured respondent appeared by its attorney, Gregory D. Worth.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue raised on review is the nature and extent of claimant's disability. The Administrative Law Judge awarded a functional impairment of 27 percent to the body as a whole. Respondent argues the Administrative Law Judge should have adopted the court ordered independent medical examiner's opinion that claimant only suffered a scheduled impairment of 10 percent to the right upper extremity. Conversely, the claimant argues the Administrative Law Judge's decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Claimant began employment with respondent on April 20, 1998. Her job required her to repetitively use a knife and hook to clean the brisket bone. She felt pain in her hands when she started work. After it worsened she reported her problems to the plant nurse.

On July 30, 1998, claimant reported to the nurse that she was experiencing pain and numbness in her hands, sharp pains in both arms which extended into her right shoulder. Claimant was initially sent to Dr. Hutchison for treatment. Because of the continued arm pain the claimant left her employment with the respondent. She was later referred to William O. Reed, Jr., M.D. for additional treatment.

Claimant testified the pain and problems with the right hand were a little worse than the left hand. Dr. Reed initially diagnosed bilateral carpal tunnel syndrome and provided conservative treatment including steroid injections in both upper extremities. On July 1, 1999, Dr. Reed performed an endoscopic decompression of the right median nerve at the wrist and the right ulnar nerve at the wrist. Claimant testified her right hand pain worsened after the surgery.

Dr. Reed also recommended surgery on the left hand. But claimant declined because of the lack of good results from the right hand surgery. The claimant was then referred for examination by Dr. Lynn D. Ketchum for treatment recommendations. Additional studies confirmed persistent right carpal tunnel syndrome and additional surgery was recommended on the right. Restrictions against repetitive gripping bilaterally were also recommended.

On February 18, 2000, Dr. Reed released claimant from treatment and rated her with a 7 percent permanent partial impairment of function to the right upper extremity.

Pedro A. Murati, M.D., examined claimant on June 8, 2000, at the request of her attorney. Upon examination, the claimant's chief complaints were pain in both hands, right greater than left and right shoulder and neck pain. Dr. Murati noted claimant had a positive carpal compression test on the left.

Dr. Murati opined the claimant has right-hand pain status post carpal tunnel release and ulnar cubital release at the wrist, left carpal tunnel syndrome, myofascial pain syndrome affecting the right shoulder girdle and neck, and right rotator cuff strain with moderate AC crepitus.

Based on the Fourth Edition of the *AMA Guides*, Dr. Murati opined the claimant's moderate carpal tunnel syndrome of the right hand is a 20 percent upper extremity

impairment. Dr. Murati rated the claimant's ulnar cubital syndrome of the right arm at 10 percent. For the moderate AC crepitus of the right shoulder, a 5 percent upper extremity impairment. The right upper extremity combines for a 32 percent upper extremity which converts to a 19 percent whole person. For the carpal tunnel syndrome of the left hand, it's a 10 percent upper extremity impairment which converts to a 6 percent whole person. For the cervical strain, it is a 4 percent whole person impairment. Using the combined values chart on page 322, these combine for a 27 percent whole person impairment.

The Administrative Law Judge ordered an independent medical examination of the claimant by Peter V. Bieri, M.D. The claimant speaks no English and was accompanied to her examination by an interpreter. Dr. Bieri performed his examination on September 25, 2000. Dr. Bieri noted claimant indicated her left upper extremity symptoms were minimal and intermittent. Claimant denies she told Dr. Bieri that her left upper extremity pain was minimal and just came and went.

Dr. Bieri concluded the radiographic findings involving the cervical spine were not causally related to claimant's few months history of work activities involving repetitive use of the upper extremities. Dr. Bieri did not detect any crepitus of the right shoulder upon his examination of the claimant. Dr. Bieri further noted that Phalen's and Tinel's testing on the left was negative. Dr. Bieri rated claimant with a 10 percent upper extremity rating on the right.

Claimant testified she has right arm pain which extends from the underside of the right wrist up toward the right elbow and into her shoulder. She complains of constant right hand pain. Her right arm and hand goes to sleep and her fourth finger of her right hand locks. She drops things because she cannot grip with her right hand. Claimant also testified she experiences pain in the palm of her left hand as well as pain and stiffness in three fingers. Lastly, she complains of pain extending from her left arm into her left shoulder.

As previously noted, respondent argues the opinion of the court ordered independent medical examiner should be adopted which limits claimant to a scheduled injury to the right upper extremity at the forearm. The Board acknowledges the use of independent medical examinations is a valuable tool of Administrative Law Judges in obtaining unbiased opinions regarding what impairments and disabilities may result from a work-related injury. In many instances, the fact that such examination is by an unbiased physician may result in that opinion being accorded more weight than opinions procured by the parties. However, while the report of the independent medical examiner shall be considered, there is no requirement to blindly adopt the court ordered independent medical examiner's opinion.

It is undisputed that claimant suffered permanent impairment of function to her right upper extremity as a result of her work-related carpal tunnel syndrome. Drs. Murati, Bieri and Reed all provided permanent impairment ratings for claimant's right upper extremity. Upon examination of claimant's left upper extremity, Dr. Bieri concluded the physical testing

for carpal tunnel was negative on the left. Conversely, Dr. Murati examined claimant and concluded the physical testing for carpal tunnel was positive on the left.

Claimant has consistently complained of pain in both hands which was more severe on the right. It is significant that the treating physician, Dr. Reed, diagnosed and treated claimant for bilateral carpal tunnel syndrome. Following surgery on the right, Dr. Reed recommended surgery on the left. When the claimant refused the surgery, Dr. Reed released claimant and rated just her right upper extremity. It is difficult to accord any significance to the treating physician's failure to rate claimant's left upper extremity especially when he had recommended surgery for the carpal tunnel condition in that extremity. The Board concludes the record supports a determination that claimant's repetitive work injuries caused her to suffer bilateral carpal tunnel syndrome as diagnosed and treated by Dr. Reed. Accordingly, the Board adopts Dr. Murati's findings of carpal tunnel syndrome in the left extremity as more persuasive than Dr. Bieri's opposite conclusion.

The Board further adopts Dr. Murati's opinion claimant suffered a 20 percent impairment to the right upper extremity. Because claimant had an unsuccessful result from her surgery on the right, Dr. Murati's rating for the right carpal tunnel syndrome is more persuasive than Dr. Bieri's 10 percent rating for the right carpal tunnel syndrome. The Board further adopts Dr. Murati's opinion claimant suffered a 10 percent impairment to her left upper extremity.

A 20 percent impairment to the right upper extremity converts to a 12 percent whole person impairment. A 10 percent impairment to the left upper extremity converts to a 6 percent whole person impairment. Using the combined values chart of the Fourth Edition of the *AMA Guides*, the 12 percent and 6 percent combine for a 17 percent whole person impairment.

Dr. Bieri examined claimant's right shoulder and cervical spine. Dr. Bieri found no palpable or visible muscle spasm of the cervical spine. He further found no evidence of atrophy in the neck or shoulder and no signs of acute inflammation of the right shoulder. Cervical and shoulder range of motion was full and unrestricted. Lastly Dr. Bieri did not find any crepitation in the right shoulder. The Board concludes the minimal objective findings of mild degenerative disc disease in the cervical spine coupled with the lack of findings during Dr. Bieri's examination support the conclusion claimant did not suffer any permanent impairment to her shoulder or neck.

The Board concludes the Administrative Law Judge's Award should be modified, in accordance with the foregoing, to reflect claimant has suffered a 17 percent permanent partial general disability.

It should be noted the parties stipulated the claimant's average weekly wage was \$345.22. K.S.A. 44-510e(a)(1) provides that the payment rate for weekly compensation for

permanent partial general disability shall be the lesser of the average weekly wage multiplied by 66 2/3% or the maximum provided in K.S.A. 44-510c. The Administrative Law Judge's Award utilized an incorrect payment rate of \$230.26 rather than the appropriate payment rate of \$230.16 ($\$345.22 \times 66 \frac{2}{3}\% = \230.16). Accordingly, the compensation recalculation of the Award will utilize the correct payment rate of \$230.16.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 16, 2001, is modified to reflect claimant suffered a 17 percent permanent partial general disability.

The claimant is entitled to 70.55 weeks of permanent partial disability compensation at the rate of \$230.16 per week or \$16,237.78 for a 17 percent permanent partial general bodily disability. All sums are due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director